

## Recent Case Shows How Healthcare Entities Can Protect Themselves While Working With Outside Contractors, Temporary Labor, and Other Third Parties

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The “joint employer” doctrine affects healthcare as much as nearly any industry. Healthcare entities frequently rely on outside labor to meet their objectives, such as by contracting with specialty medical providers, hiring temporary administrative staff to fill short-term vacancies, using outside vendors for routine custodial work and maintenance, or through myriad other relationships. In this situation, however, an entity faces a difficult balance between (a) controlling outside workers enough to protect its reputation and good will, achieve quality standards, and otherwise protect its interests while also (b) not exercising so much control that it becomes a joint employer and, therefore, creates unexpected legal liability. Earlier this decade, hardly a week passed without some court or agency interpreting this joint employment doctrine more expansively than before.

Fortunately, several recent decisions have begun scaling back these broad interpretations of joint employment (For example, as we discussed [previously](#), the NLRB is in the process of implementing a new and more balanced joint employment test). One recent decision shows another court resolving a joint employment question in a way that is evenhanded and rational. In doing so, the court provided important guidance for entities that use or rely on outside workers.

In this case, a federal court held that Jimmy Johns was not a joint employer of its franchisees’ employees, specifically a group of assistant sales managers. This decision will not bind most other courts or government agencies, but it may help persuade them, and it shows how many courts have viewed these same issues.

Most importantly, the court recognized that an entity will not become a joint employer simply because it takes steps to protect its reputation or good will, achieve certain quality standards, and provides guidance (even “extensive guidance”) to the entity that actually employs the workers. The court also recognized that an entity will not become a joint employer merely because it exercises **indirect** control over outside workers or has the **ability** to control them. (The NLRB [reached this same conclusion](#) in its “tentatively vacated” [Hy-Brand](#) decision. Rather, as this federal court emphasized, “**influence alone, even if substantial, does not constitute control.**”

The court also provided useful examples of what actions an entity may take without creating a joint employer relationship. The court did not deem Jimmy Johns to be exercising enough control to become a joint employer, even though Jimmy Johns:

- Occasionally **suggested** that the actual employer – *i.e.*, the franchisees – discipline certain employees (but did not necessarily **cause** discipline to be imposed);
- **Recommended** that the actual employers’ managers work at least fifty hours per week (but did not **require** this or enforce its recommendation);



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- Set the schedules for the actual employers' operations (but did not set the schedules for specific **employees**, even if the overarching schedules largely dictated the employees' schedules);
- Provided the employers with **advice** about how to pay particular employees, and **encouraged** the employers to offer certain bonuses (again, without actively **requiring** this);
- Retained the right to **inspect** the employers' personnel files of their employees (but did not **retain** those files itself);
- Issued the employers **guidelines** about how to address a broad range of employment decisions, including decisions about hiring and discipline (but did not actually participate in those decisions);
- Potentially required the employers to provide certain training (but this training existed largely to protect Jimmy John's good will and control quality);
- Required employees to wear certain types of clothing, and strictly controlled tattoos, facial hair, and jewelry (but, according to the court, these requirements were necessary to protect the Jimmy John's good will); and
- Occasionally penalized the actual employers for the actions of their employees (but did not directly penalize or discipline employees themselves).

The key takeaway is that, according to this court, an entity may issue guidelines, exercise indirect control, and otherwise take steps to protect its good will and quality, without creating a joint employer relationship through those actions alone. Healthcare entities should note this guidance when they negotiate contracts with, and otherwise use the services of, outside medical practices, temporary staffing providers, subcontractors, and other outside workers. This is yet another sign that businesses have flexibility to protect their interests in this area.

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